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IN THE

Supreme Court of the United States

October Term, 1957

J. THOMAS MILEY

PETITIONER,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER AND ALAN R. WILLSON, IN OPPOSITION

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August 5, 1957

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	5
ARGUMENT	9
I. No Difficult or Important Question with Respect to the McCarran-Ferguson Act is Here Involved	10
II. Independently of the McCarran-Ferguson Act, the District Court Properly Dismissed the Complaint under this Court's Decision in "Parker v. Brown"	12
III. Dismissal of the Complaint on the Ground that the Petitioner's Alleged Injury was Speculative and Remote was Correct, and Involves no Significant Question for this Court to Consider	14
IV. The Complaint Fails to Allege Facts Amounting to a Violation of the Sherman Act	17
CONCLUSION	20

TABLE OF CITATIONS

	Page
Abounof v. *J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830, 834 (N.D. Cal. 1939)	17
Apex Hosiery Co. v. *Leader*, 310 U.S. 469, 493, 500-1 (1940)	18
Arthur v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D. Md. 1937)	18
Baim & Blank, Inc. v. *Warren Connelly Co., Inc.* (S.D.N.Y. 1956). 1956 Trade Cases, ¶ 68,285	17
Blue Bell Co. v. *Frontier Refining Co.*, 213 F. 2d 354 (10th Cir. 1954)	18
Camfield Mfg. Co. v. *McGraw Elec. Co.*, 70 F. Supp. 477 (D. Del. 1947)	18
Conference of Studio Unions v. *Loew's, Inc.*, 193 F. 2d 51 (9th Cir. 1951)	18
Congress Building Corp. v. *Loew's, Inc.*, 1957 Trade Cases ¶ 68,725 (7th Cir.)	14
Cronin v. *National Shawmut Bank*, 306 Mass. 202	16
Federal Trade Commission v. *Raymond Co.*, 263 U.S. 565, 573 (1924)	18
Fedderson Motors, Inc. v. *Ward et al.*, 180 F. 2d 519, 522 (10th Cir. 1950)	18
Floyd v. *Gage*, 192 F. 2d 137, 139 (4th Cir. 1951)	11, 13
Friend v. *Lee*, 221 F. 2d 96, 100 (D.C. Cir. 1955)	15
Glenn Coal Co. v. *Dickinson Fuel Co.*, 72 F. 2d 885, 888 (4th Cir. 1934)	17, 18
Goodman, A. J. & Son v. *United Lacquer Mfg. Co.*, 81 F. Supp. 890, 893 (D. Mass. 1949)	15
Hudson Sales Corp. v. *Waldrip*, 213 F. 2d 268 (5th Cir. 1954)	18
Interborough News Co. v. *Curtis Pub. Co.*, 127 F. Supp. 269 (S.D.N.Y. 1954)	18
Keogh v. *Chicago & Northwestern Railway Company*, 260 U.S. 156, 163 (1922)	15

	Page
Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F. 2d 891, 893 (5th Cir. 1954)	17
Langnes v. Green, 282 U.S. 531, 535-539	17
Lipson v. Socony-Vacuum Corp., 76 F. 2d 213 (1st Cir. 1935)	17
National Used Car Market Report, Inc. v. National Auto Dealers Ass'n., 108 F. Supp. 692 (D.C. 1951)	17
O'Brien v. Carney, et al., 6 F. Supp. 761, 762 (D. Mass. 1934)	15
Parker v. Brown, 317 U.S. 340, 350-51 (1942)	12
Perkins v. Lukens Steel Co., 310 U.S. 113, 125-128 (1940)	15
Riedley v. Hudson Motor Car Co., 82 F. Supp. 8 (W.D. Ky. 1949)	18
Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., 195 F. 2d 86, 90 (7th Cir. 1952)	18
Schwing Motor Co. v. Hudson Sales Corporation, 138 F. Supp. 899, 904 (D. Md. 1956) aff'd. per curiam 239 F. 2d 176	19
Shotkin v. General Electric Co., 171 F. 2d 236, 239 (10th Cir. 1948)	17, 18
Silverman v. Seifrid, et als., (N.D. Ill.) 1950-51 Trade Cases, ¶ 62,874	18
Sorrentino v. Glen-Gery Shale Brick Corp., 46 F. Supp. 709 (E.D. Pa. 1942)	18
United States v. Chemical Foundation, Inc., 272 U.S. 1, 14, 15 (1926)	11, 13
United States v. Colgate & Co., 250 U.S. 300 (1919)	18
Walling v. General Industries Co., 330 U.S. 545, 547	17

PAGE

STATUTES

Clayton Act, 15 U.S.C. § 15 (1952) 2, 3, 14, 18

McCarran-Ferguson Act, 15 U.S.C. § 1011-1014 (1952) 2, 3, 4, 9, 10, 11, 12

Sherman Anti-Trust Act, 15 U.S.C. § 1 (1952) 2, 3

Massachusetts General Laws (Ter. Ed.) Chapter 32A ... 5, 6, 10, 11

Massachusetts General Laws (Ter. Ed.) Chapter 176D 11, 12

Massachusetts General Laws (Ter. Ed.) Chapters 175; 175A 11, 21

No. [redacted] 256

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OPINIONS BELOW

The Memorandum Opinion of the District Court (A 28-33) is reported in 148 F. Supp. 299. The *per curiam* opinion of the Court of Appeals for the First Circuit (A 36) is reported in 242 F.2d 758.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question here is whether the complaint, under any interpretation, states a cause of action for treble damages under Section 1 of the Sherman Act and Section 4 of the Clayton Act (15 U.S.C. §§ 1, 15, appearing p. 3 of the Petition).

The petitioner, a Massachusetts insurance broker, alleges that the five members of the Massachusetts State Employees Group Insurance Commission (including the Massachusetts Commissioner of Insurance), and certain Massachusetts insurance companies and their officers, conspired to restrain trade by causing one group insurance contract upon the lives of Massachusetts state employees to be awarded to a Massachusetts company rather than to the Minnesota company represented by the petitioner. It appears that the contract awarded by the Massachusetts Commission to the local company contained terms no less favorable to the state and its insured employees than those offered by the Minnesota company which the petitioner represented.

In its Memorandum of Decision granting Defendants' Motion to Dismiss (A. 28-33), the District Court held that the petitioner's action was barred by the provisions of the McCarran-Ferguson Act (see pp. 3, 4, *infra*), by the principle that state action is not subject to the Sherman Act, and by the petitioner's failure to allege facts showing injury to his own property or business as required by Section 4, Clayton Act, 15 U.S.C. § 15 (Petition, p. 3).

With equal correctness the District Court could have dismissed the complaint on the ground that it did not sufficiently allege a violation of the Sherman Act in

view of the absence of facts showing economic harm to the public at large, or any segment thereof, or any appreciable or substantial effect on the free flow of interstate commerce. The purported "conspiracy" related to a single isolated transaction.

The case does not raise the sweeping questions set forth in the petitioner's Petition for a writ of certiorari (pp. 2-3, *et seq.*). The McCarran-Ferguson Act is but one of several equally conclusive grounds for dismissal, and the Act's application here is limited to the uncommon situation where the state itself is a party — indeed, the principal party — to conduct which purportedly violates the Sherman Act. In any event, with or without reference to the McCarran-Ferguson Act, the complaint fails to set forth a claim cognizable under the anti-trust laws. Furthermore, the unique facts of this case are such as to make it of little, if any, importance as a precedent.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15 are set forth on page 3 of the Petition.

The McCarran-Ferguson Act is set forth in part on page 3 of the Petition and reads in its entirety as follows:

> "[§ 1011] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"[§ 1012] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"[§ 1013] (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"[§ 1014] Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920."

The Massachusetts statutes referred to herein are contained in Appendix A to the Petition, except that Massachusetts General Laws (Ter. Ed.) Chapter 175, § 54(c), 47(Sixth) appear in the Appendix to this brief.

STATEMENT

This case arises upon the *per curiam* affirmance by the Court of Appeals of an order of the District Court granting the respondents' motion to dismiss.

The District Court rendered its order and written decision eleven days after argument, and the Court of Appeals affirmed *per curiam* three days after hearing.

The facts set forth in the complaint fail to make out anything more than a private grievance for which the federal anti-trust laws provide no remedy. These facts are as follows:*

The petitioner is a licensed insurance broker and "group insurance administrator." (Par. 4.) He negotiates and services group insurance contracts, and acts for employers in their dealings with insurers. The petitioner's compensation, "if successful in his efforts", consists of commissions for placing and fees for servicing the business (Par. 4).

During 1955, the Massachusetts Legislature enacted General Laws, Chapter 32A, providing life, accidental death and dismemberment, hospital, surgical and medical group insurance for approximately 32,000 Massachusetts state employees (Par. 5). To obtain the insurance and administer the program, the statute established the five-member State Employees Group Insur-

*References are to paragraphs of the complaint, appearing on page A6 through A20 of the Petitioner's Record Appendix.

ance Commission, the members of which are defendants herein (Par. 3). The Commission was required by statute to,

> "*negotiate with* and purchase, on such terms as it deems to be in the best interest of the Commonwealth and its employees, from one or more insurance companies . . . a policy or policies of group life and accidental death and dismemberment insurance . . . G.L. (Ter. Ed.) c. 32A, § 4. (Emphasis supplied.)

In November 1955 (although not required by law to do so) the Commission published and circulated an invitation for bids or proposals from insurance companies licensed to do business in Massachusetts. All such bids or proposals were to be received by the Commission before 5:00 P.M. on December 1, 1955 (Par. 6).

In response to this invitation, the petitioner "enlisted the cooperation" of three insurers, namely, Minnesota Mutual Life Insurance Company (a Minnesota corporation) and Massachusetts Hospital Service, Inc. ("Blue Cross"), and Massachusetts Medical Service ("Blue Shield"), and he submitted a "package" bid providing (1) life and accidental death and dismemberment coverage by Minnesota, and (2) hospital, surgical and medical coverage by Blue Cross-Blue Shield (Pars. 8, 9). This "package bid" allegedly embodied greater benefits for a three-year contract term than were offered by any other bidders *who submitted bids on or prior to December 1* (Pars. 10, 11) (emphasis supplied). With respect to the life and accidental death and dismemberment coverage, Minnesota Mutual's bid allegedly had a lower premium cost than was proposed by the defendants Hancock, Columbian, Loyal, Monarch, New England, Revere and State in a separate joint bid submitted prior to December 1, 1955 in the

name of "Massachusetts Life Insurance Companies." (Par. 11.) Nineteen bids were submitted to the Commission (Par. 12).

After preliminary bids were in, the five members of the Commission allegedly "conspired" with the other defendants to prevent the award of the life and accidental death and dismemberment portion of the business to Minnesota, and to award it instead to the Massachusetts companies (Par. 13). The Commission members asked a representative of Blue Cross and Blue Shield if these companies would offer the same hospital, medical and surgical benefits in cooperation with a life insurance company other than Minnesota, and he replied that Blue Cross and Blue Shield would, provided the premium rate of the other company did not exceed 90¢ per thousand (Par. 14).

"The defendants then proceeded to devise ways and means for the 'Massachusetts Life Insurance Companies' to *meet* the Minnesota bid." (Par. 14.) (Emphasis supplied.) The different defendant insurance companies sought "a proposed plan which would provide ways and means of meeting or bettering said low bid of NINETY CENTS (90¢) . . ." (Par. 15.)

Ultimately, the Massachusetts companies were able to offer the 90¢ rate by joining with the defendant Boston Mutual Life Insurance Company, a company which had not participated in the earlier proposals of the Massachusetts companies. Certain of the defendants agreed to loan to Boston a number of trained employees to establish a proper department for carrying on the work involved (Par. 10). The contract for group life and accidental death and dismemberment was then awarded by the Commission on December 30,

1955, to Boston at the 90¢ rate, the other defendant companies acting as reinsurers of 95% of the total amount of insurance covered by the contract (Par. 20).

Up to and including the date of the awarding of the contract to Boston, it is alleged that Boston could not legally execute a contract for accidental death and dismemberment insurance because its charter permitted it to conduct "only life insurance on the assessment plan," and was never amended to include other classes of insurance (Par. 21). However, as a matter of statutory law this irrelevant allegation does not accurately state the applicable Massachusetts statutes. See Appendix, *infra*.

The complaint concludes with the allegations that the defendant companies and their executives desired that they, rather than Minnesota, should get the business, which carried with it considerable prestige (Par. 22); and that solely as a result of the defendants' actions; Minnesota failed to receive the award of the contract and the petitioner was deprived of compensation for servicing the contract and commissions and service fees for new business which would have resulted (Par. 23). (The petitioner does not allege that he would have received any commission on the state employees' business.)

It appears that the petitioner is complaining primarily of the defendants' efforts during December of 1955 to cause the Massachusetts companies to lower their bid. The "conspiracy" consists of the Commission's diligent and successful efforts to obtain low-cost insurance from a company with main offices and servicing facilities located nearer than in Minnesota.

As a result of the purported "conspiracy", the state employees were benefited. Competitive conditions in the insurance business were unaffected. Except for this isolated transaction, it is not alleged that the business of Minnesota Mutual (which is not a party here), or of the petitioner, was or would be curtailed in Massachusetts or elsewhere.

The petitioner seems to believe that the Commission was required to adhere to a system of strict competitive bidding. This is not so. The statute creating the Commission required it to "negotiate" with the prospective insurers. G. L. (Ter. Ed.) c. 32A §4 (Appendix A to Petition, p. 38), which is exactly what the Commission did. The competitive freedom which the Sherman Act is supposed to foster would be threatened if a purchaser were not allowed to confer informally with a likely supplier in an effort to obtain the best bargain.

ARGUMENT

Seventeen pages of the Petition are devoted to a discussion of the McCarran-Ferguson Act, and to the mistaken contention that the decision of the District Court involves "for the first time in this Court the question of the extent to which the states may regulate the business of insurance under the permission granted by the McCarran-Ferguson Act . . . in order to foreclose Federal jurisdiction of an action for treble damages for a violation of the Sherman Act." (Petition, p. 5.)

The petitioner ignores (1) that this case at most involves application of the McCarran-Ferguson Act to the possible antitrust aspects of a state's own purchase of insurance—a matter of little recurring significance, and (2) that there are at least three equally persuasive

grounds, hereinafter discussed, for dismissing the complaint. These latter are wholly independent of the McCarran-Ferguson Act and raise no novel or important issue of law.

I.

No Difficult or Important Question with Respect to the McCarran-Ferguson Act is Here Involved

The District Court held merely that since the McCarran-Ferguson Act allows the states to regulate the business of insurance, and to suspend thereby the operation of the Sherman Act, it follows that an insurance transaction negotiated, approved, administered, entered into and, to a large degree, formulated by a state is not subject to the Sherman Act.

This holding does not require determination of whether state *regulatory* legislation falling short of a "baby Sherman Act" is sufficient to suspend operation of the federal Act as to transactions between private parties. Determination of this question, which the petitioner alleges to be of significance in thirty-one states, is neither necessary nor desirable in this case.

Procurement by the State Employees Group Insurance Commission of the group insurance in issue was provided for by Chapter 32A of the Massachusetts General Laws (Petitioner's Appendix A, pp. 35-42).*

*The Commission was required to report annually to the Governor and Legislature. G.L. (Ter. Ed.) c. 32A, § 3. Its members consist of the Massachusetts Insurance Commissioner, the Commissioner of Administration, and three appointees by the Governor with the advice and consent of the Council. G.L. (Ter. Ed.) c. 32A, §3. The Commission was invested with authority to adopt such reasonable rules and regulations as necessary to administer the Act. G.L. (Ter. Ed.) c. 32A, §3. Detailed specifications relating to the insurance were provided.

The Commission was required to purchase the insurance "on such terms as it deems to be in the best interests of the Commonwealth and its employees." G.L. (Ter. Ed.) c. 32A § 4. In the absence of any contrary allegations in the complaint, the members of the Commission must be presumed to have carried out their statutory duty properly and in good faith in all respects. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 4, 14, 15 (1926). *Floyd* v. *Gage*, 192 F. 2d 137, 139 (4th Cir. 1951).

Every aspect of the purchase of this insurance was controlled by the state. Since one of the Commission members was the Commissioner of Insurance, all the activities here complained of were known to and approved by the official responsible for regulating the business of insurance in Massachusetts and for preventing unfair competitive practices therein. G.L. (Ter. Ed.) 176D (Appendix A to the Petition, pp. 42-45); see also c. 175 and c. 175A.

The following language from the House Report accompanying the draft McCarran-Ferguson Act, cited by the petitioner on page 17 of the Petition, is much in point here:

> "It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts."

Here, the Commonwealth of Massachusetts not only *permitted* the agreement or contract in question—it was a party to it.

As a further basis for its decision, the District Court makes passing reference to various regulatory statutes in Massachusetts. See especially G.L. (Ter. Ed.) c. 176D (Appendix A to the Petition, p. 42-45). These lend added support to its opinion. But such regulatory statutes of general application are not essential to the District Court's holding. Having been negotiated, approved, entered into and, to a large degree, formulated by the state itself, this transaction was *a fortiori*, and at very least, "regulated" by the state.

Construction of the McCarran-Ferguson Act in this case is narrowly limited to a unique factual situation involving the possible anti-trust aspects of a state's own purchase of insurance. Such purchases are insignificant relative to the insurance business as a whole or the national economy, and the dearth of reported cases indicates a virtual absence of anti-trust problems relative thereto. No useful purpose would be served by grant of *certiorari*.

II.

Independently of the McCarran-Ferguson Act, the District Court Properly Dismissed the Complaint Under this Court's Decision in "Parker v. Brown"

The holding in *Parker* v. *Brown*, 317 U.S. 340, 350-51 (1942) that Section 1 of the Sherman Act is not "intended to restrain state action or official action directed by the state" is a further clear ground for dismissal relied upon by the District Court.

The activities alleged here were directed and initiated by a state commission acting within its authority. The negotiation and execution of the insurance contract con-

stituted state action, on account of which neither the defendant state officials nor the defendant companies and their officers can be held to have violated the Sherman Act.

The petitioner asserts, without basis, that *Parker* v. *Brown, supra*, does not apply since the members of the Commission somehow exceeded their statutory authority (Petition, p. 33). However, there are no facts alleged in the complaint to upset the presumption that the members of the Commission performed their statutory duties faithfully. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14, 15 (1926). To the contrary, it appears that the Commission members insisted upon obtaining the lowest rates and the most favorable contract, and in no way exceeded or failed to carry out their statutory powers and duties. It is not alleged that any Commissioner acted selfishly or from private considerations.*

The cases cited by the petitioner concern actions by state officials going patently beyond the scope of their authority, and are irrelevant here.

Parker v. *Brown, supra*, is controlling, and was correctly applied by the District Court.

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* As was said in *Floyd* v. *Gage*, 192 F. 2d 137 at 139 (4th Cir. 1951),

"The defendants are officers of the State of North Carolina presumably discharging their official duty when acting upon matters properly coming within its scope. While their official status will not protect them from liability for violation of the federal statutes, something more is required to bring them in to answer for such violation than mere general charges of conspiracy and combination and abuse of official duty without allegation of any facts showing that unlawful combination or conspiracy in fact existed or that official duty had been transcended or abused thereby."

III.

Dismissal of the Complaint on the Ground that the Petitioner's Alleged Injury was Speculative and Remote was Correct, and Involves No Significant Question for this Court to Consider

A further independent ground for dismissal relied upon by the District Court is that the petitioner's alleged injuries were too indirect and speculative to permit him to recover under 15 U.S.C. § 15 (Petition, p. 3).

The petitioner asserts that the District Court's opinion stems from a line of authority which conflicts with contrary holdings in other circuits. This conflict is said to arise from a difference of opinion as to the degree of directness of injury to business or property which a plaintiff must have sustained in order to maintain an action for treble damages.

None of the cases cited in the Petition, however, are remotely similar on their facts to this one. For example, in *Congress Building Corp.* v. *Loew's, Inc.*, 1957 Trade Cases ¶ 68, 725 (7th Cir.), the question was whether a non-operating landlord of a motion picture house which was entitled under its *written lease* to a percentage of the lessee's gross receipts could sue for damages arising from a conspiracy directed against the lessee. The 7th Circuit held that it could. But that case in no way conflicts with the District Court's decision here. The defect here is not so much that any interest which the petitioner has in the alleged violation of the anti-trust laws is indirect. Rather it is that he fails to set forth facts showing the existence of any interest at all.

It is entirely conjectural whether or not, but for the defendants' conduct, the Minnesota company represented by the petitioner would have got the award.

There were eighteen other bidders. Where government officers have, as here, the duty to select "the contract most advantageous to the government, . . . advantage is not measured exclusively in terms of price; it includes other factors such as judgment, skill, ability, capacity, and integrity." *Friedl v. Lee*, 221 F. 2d 96, 100 (D.C. Cir. 1955). *O'Brien v. Carney, et al.*, 6 F. Supp. 761, 762 (D. Mass. 1934). *A. J. Goodman & Son v. United Lacquer Mfg. Co.*, 81 F. Supp. 890, 893 (D. Mass. 1949). The proximity of the insurer's home office, the reputation of the insurer, and the availability of servicing facilities in Massachusetts were factors to be weighed along with price. A governmental agency's discretion in awarding a contract is controlling and is not subject to judicial review. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125-128 (1940). *O'Brien v. Carney, et al.*, 6 F. Supp. 761, 762 (D. Mass. 1934). The Massachusetts Commission, for reasons sufficient to itself, could have selected any one of the eighteen other bidders. Only by improperly substituting its own determination in place of that conferred by law upon the Commission could a court reach the conclusion that Minnesota Mutual, rather than another bidder, would have obtained the award.

Moreover, it is not clear from the complaint that the petitioner had any legal right to compensation from Minnesota Mutual. "Injury implies violation of a legal right." *Keogh v. Chicago & Northwestern Railway Company*, 260 U.S. 156, 163 (1922). In paragraph 23 of the complaint the petitioner alleges generally that he was deprived of compensation for "servicing" the state employees' contract and of "commissions and service fees for *new business* which would have resulted had said contract been awarded to Minnesota". (Emphasis supplied.) However, there is no reference in the com-

plaint to a contract between the petitioner and Minnesota Mutual relative to compensation for "servicing" the state employees' contract. The petitioner does not allege anywhere that he was to be awarded commissions by Minnesota Mutual.* As for servicing fees, neither the insured nor the insurer have a legal duty to place the servicing of a policy with the original broker in the absence of a contract to do so. See *Cronin* v. *National Shawmut Bank*, 306 Mass. 202.

That the petitioner was deprived of commissions and fees for *new business* is obviously conjectural. It relates to a mere hope. What, if any, new business would have been created is beyond anyone's power to predict.

It is stated in the Petition that the petitioner "is in the same position as the [a] sales agent." (Petition, p. 32). However, the complaint alleges that the petitioner was a broker. A broker is not necessarily an agent. For all that appears, the petitioner's efforts in behalf of Minnesota Mutual were entirely speculative and were undertaken purely in the hope that, if matters turned out right, some satisfactory arrangement for compensation could be arranged either with Minnesota Mutual or the Commonwealth. None of the cases cited in the Petition permit recovery where the relationship between the plaintiff and the party actually injured is so indefinite and obscure.

Determination of this point, in any event, turns on the particular facts of this case. A purported conflict between circuits in cases having to do with movie house leases and patent licenses is no basis for granting *certiorari* here.

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*In the group insurance field commissions usually go solely to the broker designated by the insured, who may or may not be the original broker.

IV.

The Complaint Fails to Allege Facts Amounting to a Violation of the Sherman Act

The District Court did not consider whether the defendants' activities amounted to a conspiracy in restraint of trade. For purposes of its opinion, the Court assumed the existence of such a conspiracy. The Court doubtless believed that the other available grounds of decision were so strong that there was no need to consider this question.

In point of fact, the complaint falls far short of alleging facts amounting to an illegal conspiracy or combination violative of the Sherman Act.* For this further reason *certiorari* should be denied. See *Langnes* v. *Green*, 282 U.S. 531, 535-539. *Walling* v. *General Industries Co.*, 330 U.S. 545, 547.

A private anti-trust suit is designed to further the public purposes of the anti-trust laws. This complaint fails to set forth any conduct whatever which could have resulted in economic harm to the public or any important segment thereof. See *Kinnear-Weed Corp.* v. *Humble*

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*General conclusionary allegations of a conspiracy to restrain trade, of unlawful acts, and of illegal purpose are not enough. *Lipson* v. *Socony Vacuum Corp.*, 76 F.2d 213 (1st Cir. 1935). A court will look to the specific acts averred to determine as a matter of law whether these, if proven, would constitute a violation of the Sherman Act. *Shotkin* v. *General Electric Co.*, 171 F.2d 236, 239 (10th Cir. 1948). *National Used Car Market Report, Inc.* v. *National Auto Dealers Ass'n.*, 108 F. Supp. 692 (D.C. 1951). *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934). Anti-trust litigation is notoriously protracted, and courts have recognized that it would be unfair to force defendants to trial on the basis of pleadings which do not indicate with reasonable clarity that the plaintiff has a case. *Baim & Blank, Inc.* v. *Warren-Connelly Co., Inc.* (S.D.N.Y. 1956) 1956 Trade Cases ¶ 68,285. *Abanof* v. *J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830, 834 (N.D. Cal. 1939).

Oil & Refining Co., 214 F. 2d 891, 893 (5th Cir. 1954). *Fedderson Motors, Inc.* v. *Ward et al.*, 180 F. 2d 519, 522 (10th Cir. 1950).

None of the types of economic harm customarily associated with anti-trust violations are alleged. There was no increase in or fixing of insurance rates, no diminution in the volume of goods or services in competitive markets, no deterioration in the quality of goods or services, or other like evil consequence in the free flow of commerce. *Ape. Hosiery Co.* v. *Leader*, 310 U.S. 469, 493, 500-1 (1940). *Shotkin* v. *General Electric Co., supra.*

It is well established that individuals and entities may deal and trade with whom they please *unless* their conduct is part of a larger combination or conspiracy to restrain trade or monopolize a market. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). *Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565, 573 (1924).

Isolated instances of harm, or harm to the plaintiff alone, do not permit the maintenance of an action under Section 4 of the Clayton Act.* The restraint upon competition resulting from an individual plaintiff's loss of a single contract is too slight. *Ruddy Brook Clothes, Inc.* v. *British & Foreign Marine Ins. Co.*, 195 F. 2d 86, 90 (7th Cir. 1952). *Silverman* v. *Seifrid, et als* (N.D., Ill.) 1950-51 Trade Cases, ¶62,874.

Blue Bell Co. v. *Frontier Refining Co.*, 213 F.2d 354 (10th Cir. 1954). *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (5th Cir. 1954). *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951). *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1934). *Interborough News Co.* v. *Curtis Pub. Co.*, 127 F. Supp. 289 (S.D.N.Y. 1954). *Riedley* v. *Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D.Ky. 1949). *Camfield Mfg. Co.* v. *McGraw Elec. Co.*, 70 F. Supp. 477 (D.Del. 1947). *Sorrentino* v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E.D.Pa. 1942). *Arthur* v. *Kraft-Phenix Cheese Corporation*, 26 F. Supp. 824 (D.Md. 1937).

As was said in *Schwing Motor Company* v. *Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md. 1956) aff'd. *per curiam* 239 F. 2d 176, at 904,

> "one of the grounds of decision in the Apex case: [*Apex Hosiery Co.* v. *Leader*, *supra*.] was that the public was not injured by the fact that 1,000 dozen pairs of Apex stockings failed to move in interstate commerce, because the conspiracy had no effect on the market of the general commodity, and did not give the conspiring group the power to fix prices, restrict production, or lessen quality with impunity, inasmuch as the general market remained in its normal competitive state. So, in the case at bar, the public was not injured by the alleged fact that 357 Hudson automobiles failed to move in interstate commerce, since the market in the general commodity, automobiles in all price ranges, remained in its normal competitive state."

Nothing in the complaint even remotely suggests that the normal competitive state of the insurance market was affected by the defendants' alleged conduct.

The allegations that the conspiracy sought to eliminate Minnesota Mutual as a competitor and discourage it from continuing to solicit business in Massachusetts (Complaint, Pars. 14, 15, A. 14, 15), and that the defendants "knew that if the contract was awarded to Minnesota it would carry with it considerable prestige and result in Minnesota acquiring considerable new business in Massachusetts and elsewhere (Complaint, Par. 22, A. 19), are mere conclusions. Minnesota Mutual is not a party here. The awarding of the state employees' business to other insurers under the circumstances alleged does not show a design to injure Minnesota Mutual. That the loss of a single group insurance contract would "discourage" Minnesota Mutual is a

virtual absurdity. The plaintiff fails to spell out any of the economic facts relevant to such assertion, such as Minnesota Mutual's size in relation to a particular market.

The plaintiff sets forth no facts showing that the conduct alleged had or could have had any appreciable effect whatever on the flow of interstate commerce.

No purpose would be served by a grant of certiorari where it is plain, as it is here, that the complaint, on the basis of entirely familiar principles of law, fails to set forth a cause of action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

MASSACHUSETTS GENERAL LAWS (Ter. Ed.) Chapter 175, §§54(c); 47 (Sixth)

§54. No domestic mutual company shall transact any other kind of business than is specified in its charter or agreement of association, except that it may in addition transact the kinds of business specified below by reference to the several clauses of section forty-seven, as follows: . . .

(c) The sixth, excepting subdivision (e) thereof, if authorized to transact life insurance, whether or not it has a capital stock, provided it has net cash over all liabilities, computed on the basis fixed by sections nine to twelve, inclusive, of not less than four hundred thousand dollars.

§47 . . . .

Sixth, to insure (a) any person against bodily injury or death by accident, or . . . (d) to make insurance upon the health of individuals. . . .